

BRB No. 98-0951 BLA

MAZIE CAUDILL)
(Widow of WILBURN CAUDILL))
)
 Claimant-Petitioner)
)
 v.)
)
 ARCH ON THE NORTH FORK, INC.)
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)

DATE ISSUED:

DECISION AND ORDER

Appeal of the Decision and Order - Denying Benefits of Donald W. Mosser,
Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen, Chartered), Washington, D.C., for
employer.

Dorothy L. Page (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate
Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid
and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice),
Washington, D.C., for the Director, Office of Workers' Compensation Programs,
United States Department of Labor.

BEFORE: BROWN and McGRANERY, Administrative Appeals Judges, and
NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals from the Decision and Order - Denying Benefits (97-BLA-0911)
of Administrative Law Judge Donald W. Mosser with respect to a claim filed pursuant to

the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The relevant procedural history of this case is as follows: The miner filed an application for benefits on October 6, 1980. In a Decision and Order dated July 2, 1985, Administrative Law Judge Robert L. Hillyard credited the miner with 6.5 years of coal mine employment and considered the claim under the regulations set forth in 20 C.F.R. Part 718. Judge Hillyard found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. The miner appealed to the Board which, in a Decision and Order issued on August 19, 1988, affirmed the denial of benefits. *Caudill v. Falcon Coal Co.*, BRB No. 85-1829 BLA (Aug. 19, 1988)(unpub.). The miner died on July 11, 1990, having taken no further action with respect to his claim.

Claimant filed an application for survivor's benefits on January 25, 1991. The district director denied this claim in a letter dated July 19, 1991. Claimant filed a second application for survivor's benefits on January 17, 1997. The district director also rejected this claim and the case was transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Donald W. Mosser (the administrative law judge) for formal hearing. In a Decision and Order issued on April 6, 1998, the administrative law judge found that under the terms of 20 C.F.R. §725.309(d), he was required to deny claimant's January 1997 survivor's claim. The administrative law judge determined that claimant's argument that Section 725.309(d) should not be applied in this case, as claimant acted without the effective representation of counsel in her first survivor's claim, was without merit. The administrative law judge also noted that the evidence of record did not establish that the miner suffered from pneumoconiosis pursuant to Section 718.202(a)(1)-(4) or that his death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied. On appeal, claimant asserts that the administrative law judge erred in relying upon Section 725.309(d) to deny her second application for survivor's benefits. Both the Director, Office of Workers' Compensation Programs (the Director), and employer have responded and urge affirmance of the denial of benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant's sole contention on appeal is that the administrative law judge should have granted an exception to the operation of Section 725.309(d) in this case on the grounds that claimant was not represented by competent counsel at the time that she submitted her initial claim. Claimant also maintains that she was not in a position to represent herself during the proceedings related to her initial claim due, in part, to her pursuit of a complaint that she had filed against her attorney with the Kentucky Bar

Association. Claimant states that prior to the date on which she actually filed her first survivor's claim, she submitted a Form CM-1078 in which she indicated that Peggy Terrell was the attorney authorized to represent her. Director's Exhibit 30 at 1. Claimant subsequently inquired as to the status of the miner's claim and the district director informed her that it had been finally denied. The district director also included an application for survivor's benefits, inasmuch as claimant's inquiry appeared to represent an intent to file a new claim. The district director forwarded a copy of this correspondence to Ms. Terrell. Claimant completed the application on January 25, 1991, noting on its face that she paid "Peggy Terrell once to send this in and [did] all the work myself." Director's Exhibit 30 at 352. When the district director issued the denial letter on July 19, 1991, no copy was provided to Ms. Terrell. According to claimant, "without the aid of an attorney[,] claimant was unable to appeal this denial, resulting in the administrative closing of her claim." Claimant asserts that the district director should have ascertained that she was not competent to represent herself in her initial claim and should have insured that she understood the implications of the letter informing her that her claim had been denied.

The Director and employer have responded to these contentions by asserting that the administrative law judge properly determined that claimant was not entitled to an exception to the application of Section 725.309(d). The Director and employer also note that claimant has not challenged the administrative law judge's findings regarding the merits of the survivor's claim, but rather merely states that they are irrelevant in light of the administrative law judge's determination that an award of benefits on the second survivor's claim was precluded pursuant to Section 725.309(d). Finally, employer indicates that the administrative law judge's findings under Sections 718.202(a) and 718.205(c) are supported by substantial evidence.

We hereby affirm the administrative law judge's determination that claimant did not prove that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) on the grounds that it is rational and supported by substantial evidence.¹ The evidence relevant to Section 718.205(c) consists of the death certificate, the autopsy report, and Dr. Naeye's report based upon a review of the autopsy report and tissue slides. Director's Exhibits 9, 27, 30 at 20-34. Dr. Scott prepared the death certificate and identified carcinoma of the lung as the immediate cause of the miner's demise. Director's Exhibit 9. In the section requiring identification of other significant conditions contributing to, but not resulting in, the underlying cause of death, Dr. Scott

¹Contrary to claimant's assertion, the administrative law judge's determinations under 20 C.F.R. §718.205(c) are not irrelevant. The administrative law judge's disposition of the second survivor's claim pursuant to 20 C.F.R. §725.309(d) did not preclude him from rendering an alternative disposition on the merits pursuant to Section 718.205(c). *See generally Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161,164 n.5 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

listed arteriosclerotic heart disease, severe obstructive airways disease, panacinar emphysema, and pigment deposition in the subpleural parabronchial and perivascular connective tissue consistent with a history of coal and quarry mining. *Id.* In a subsequent letter submitted after Dr. Scott reviewed the autopsy report, he confirmed the information appearing on the death certificate. Director's Exhibit 27. Dr. Shoss performed the autopsy, which was limited to the miner's lungs, and diagnosed small cell carcinoma, panacinar emphysema, and pigment deposition consistent with a history of coal and quarry mining. *Id.* Dr. Shoss later indicated that he would not proffer an opinion regarding the existence of simple or complicated pneumoconiosis, as he did not consider himself qualified to render such an opinion. Director's Exhibit 30 at 21. Dr. Naeye concluded that coal workers' pneumoconiosis was absent and, therefore, could not have contributed to the miner's death in any way. Director's Exhibit 30 at 20.

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the present case arises, has held that, for the purposes of Section 718.205(c)(2), pneumoconiosis is considered a substantially contributing cause of the miner's death where pneumoconiosis actually hastens death. See *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

In the present case, the administrative law judge acted within his discretion in finding that the relevant evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis under the terms of Section 718.205(c). The administrative law judge rationally concluded that inasmuch as neither the death certificate nor the autopsy report contains a diagnosis of pneumoconiosis and the reviewing physician confirmed that there was no evidence of pneumoconiosis and that the pulmonary conditions suffered by the miner were not related to coal mine employment, claimant did not carry her burden pursuant to Section 718.205(c).²

²Section 718.205(c)(3) is not applicable in the present case, as there is no evidence that

Decision and Order at 5; see *Neeley, supra*; *Boyd, supra*; *Brown, supra*. We affirm, therefore, the administrative law judge's finding under Section 718.205(c) and the denial of benefits.³

the miner was suffering from complicated pneumoconiosis. 20 C.F.R. §§718.205(c)(3), 718.304.

³In light of the administrative law judge's appropriate finding with respect to the absence of evidence supporting claimant's burden under Section 718.205(c), we decline to address claimant's arguments concerning the administrative law judge's application of 20 C.F.R. §725.309(d).

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge